Nos. 91-790 and 91-1206

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CSX TRANSPORTATION, INC.,
Petitioner

v.

LIZZIE BEATRICE EASTERWOOD
Respondent

LIZZIE BEATRICE EASTERWOOD,
Petitioner

v.

CSX TRANSPORTATION, INC.
Respondent

On Writs of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF FOR THE TEXAS CLASS I RAILROADS AS AMICI CURIAE IN SUPPORT OF PETITIONER IN NO. 91-790 AND RESPONDENT IN NO. 91-1206

(Amici Curiae listed on inside cover)

CAROLYN F. CORWIN
CECILY E. MCCOWEN
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

PAUL A. CUNNINGHAM
GERALD P. NORTON *
PEPPER, HAMILTON & SCHEETZ
1300 - 19th Street, N.W.
7th Floor
Washington, D.C. 20036
(202) 828-1200

ROBERT BRIAN BURNS, JR.
WILSON, GROSENHEIDER & BURNS
P.O. Box 1584
Austin, Texas 78767
(512) 478-1657

Counsel for Amici Curiae
Texas Class I Railroads

August 27, 1992

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

LIST OF AMICI CURIAE

Missouri Pacific Railroad Company
Southern Pacific Transportation Company
St. Louis Southwestern Railway Company
Atchison, Topeka & Santa Fe Railway Company
Burlington Northern Railroad Company
Kansas City Southern Railway Company
Louisiana & Arkansas Railway Company

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-790

CSX TRANSPORTATION, INC.,
Petitioner

v.

LIZZIE BEATRICE EASTERWOOD
Respondent

No. 91-1206

LIZZIE BEATRICE EASTERWOOD,
Petitioner

v.

CSX TRANSPORTATION, INC.
Respondent

On Writs of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF FOR THE TEXAS CLASS I RAILROADS AS AMICI CURIAE IN SUPPORT OF PETITIONER IN NO. 91-790 AND RESPONDENT IN NO. 91-1206

INTEREST OF THE AMICI CURIAE [1]

The *amici*, members of the Texas Railroad Association, are Class I railroads that operate freight trains throughout a number of states, including the State of Texas.

---

[1] Pursuant to Rule 37.3 of the Rules of this Court, letters indicating the written consent of all parties to the filing of this brief are being lodged with the Court.

Each is a respondent in a case currently pending before this Court, *Railroad Comm'n of Texas* v. *Missouri Pacific R.R.*, No. 91-1423 (pet. for cert. filed Mar. 5, 1992). In that case the Texas Railroad Commission seeks review of a decision of the United States Court of Appeals for the Fifth Circuit holding that state requirements for walkways adjoining railroad tracks and roadbeds are preempted under the Federal Railroad Safety Act of 1970, 45 U.S.C. §§ 431 *et seq.* ("FRSA"). The Fifth Circuit's decision is in conflict with the decision of another court of appeals regarding state regulation of walkways, *Southern Pacific Transportation Co.* v. *Public Utilities Comm'n of California*, 820 F.2d 1111 (9th Cir. 1987).

The preemption provision at issue in the walkways case, 45 U.S.C. § 434, is the same provision under consideration in this case. In addition, *amici* have made preemption arguments based on Section 434 in response to state and local efforts to regulate safety aspects of other railroad operations, involving, for example, transportation of hazardous materials, use of cabooses, and accident reporting. All *amici* also have an interest in the specific issues presented by this case, involving federal preemption of state common law standards relating to the need for traffic control devices at crossings and train speed. As parties to litigation concerning grade crossing incidents, *amici* have raised federal preemption defenses similar to those raised by CSX Transportation here. For example, one *amicus*, the Missouri Pacific Railroad Company, is currently challenging a $12 million jury verdict against it in part on the ground that the plaintiffs' claims of failure to install active traffic control devices at a grade crossing and excessive train speed are preempted. *Missouri Pacific R.R. Co.* v. *Lemon*, No. A-14-91-652-CV (Tex. App. 14th Dist.).

For all these reasons, *amici* have an interest in the analysis the Court adopts in this case. *Amici* believe it is important that, in deciding this case, the Court recog-

nize the broad mandate for national uniformity that Congress articulated in the FRSA and apply Section 434 in a manner that will give effect to that mandate. In particular, *amici* focus their attention on the transitional exception in Section 434 permitting state regulation unless the Secretary of Transportation has adopted regulations "covering the subject matter" of the state requirement, an exception involved in both this case and No. 91-1423. *Amici* submit that the Court should construe the "covering the subject matter" exception so that state law is preempted when it concerns the same basic subject as the federal regulation. Application of the exception should be straightforward. There should be no requirement that the Secretary and the state agency have the same purpose or regulate in precisely the same manner or that there be a showing of functional conflict between the two regulations.

SUMMARY OF ARGUMENT

In the Federal Railroad Safety Act Congress provided for establishment of uniform, comprehensive rules and standards relating to rail safety, to be delineated and imposed at the national level. To end the patchwork system of varying state and federal laws and regulations that existed prior to 1970, Congress expressly preempted state and local law in this area in very broad terms, subject only to two narrow exceptions. 45 U.S.C. § 434. The principal exception of continuing importance permits state law to address "essentialiy local" hazards, but only if such law is not incompatible with federal law and does not unduly burden interstate commerce. The other exception was transitional in nature; it permitted state law to operate only until the Secretary of Transportation had adopted regulations "covering the subject matter" of the state regulation.

Congress adopted this expansive preemption provision in an effort not only to foster "nationally uniform" regulation of rail safety, but to avoid burdensome litigation

over the scope of federal preemption. To these ends Congress specifically rejected an approach that would have required a comparison of the federal and state regulations to see whether the federal requirements were "equal to or higher than" the state requirements.

In considering whether federal and state laws or regulations "cover" the same "subject matter" under the transitional exception, it should suffice that in a broad sense they concern the same subjects. If that is so it should not be necessary, to establish preemption, that the state and federal regulations have the same "purpose" or "objective"—a litigation-provoking concept that would be difficult to establish and easy to manipulate. Nor should it be necessary to conclude that the Secretary and a state regulator have taken precisely the same approach to regulation of an area of rail operations. For preemption, it should also not be necessary to find an actual conflict between the federal and state regulations; of course, the existence of conflict, like similarity of purpose, tends to confirm that the regulations cover the same subject matter. Litigants and courts should not be required to engage in costly, time-consuming trials concerning the operational interaction of the federal and state regulations; again, where the state requirements impair or add to the federal requirements, that will confirm that they cover the same subject matter and that the state requirements are therefore preempted.

If Section 434's preemption of state law "covering the subject matter" of federal law or regulations is not broadly construed, state regulators (or state juries) will continue to attempt to impose on railroads' operations their divergent, often-parochial views of what is desirable and affordable. That would result in the very patchwork of regulations that Congress sought to end when it passed the Federal Railroad Safety Act. It would also precipitate the uncertainty and litigation that Congress sought to avoid in adopting the broad terms of Section 434 and rejecting the "equal to or higher than" standard. The

broad approach to preemption must encompass common law requirements relating to rail safety imposed after-the-fact by judges and juries, since such determinations, where they concern the subject matter of federal regulations, are fundamentally incompatible with the congressional mandate of nationally uniform rail safety standards.

In this case the Court should conclude that the federal statutes, regulations, and standards concerning traffic control devices at grade crossings and train speed cover the same subject matter as the state tort law requirements invoked by Easterwood. In resolving that issue, however, the Court should have in mind the broader array of state-federal disputes that have arisen—such as the roadbed walkways issue presented in No. 91-1423. The Court's holding should be cast in terms broad enough to make clear that state law concerning the same subject as federal regulations and standards is broadly preempted, even if it does not have the same purpose as, or track precisely, the federal requirements, and regardless of whether there is any showing of functional conflict between the state and federal regulations and standards.

ARGUMENT

I. A BROAD VIEW OF THE SUBJECT MATTER PREEMPTED BY SECTION 434 IS ESSENTIAL TO ACHIEVE THE NATIONAL UNIFORMITY CONGRESS INTENDED

Since 1970 the federal government has comprehensively regulated safety issues relating to virtually all aspects of railroad operations. As shown in this brief, Congress, in enacting the Federal Railroad Safety Act of 1970 ("FRSA"), provided a strong mandate for national uniformity of rail safety regulation. Nevertheless, state and local governments have promulgated statutes and regulations on a variety of rail safety matters. They have sought to enforce such laws against the railroads that operate within their borders.

The question here is whether federal law preempts a tort plaintiff's arguments that a railroad negligently failed to provide an adequate traffic control device at a grade crossing and that the speed of defendant's train was negligently excessive. The Court's reasoning in this case will provide guidance for resolution of many other federal preemption challenges to attempted state and local regulation of interstate rail safety.

If the Court were to give a narrow scope to preemption under Section 434, the result would be not only to permit the existing efforts of states to overlay their rail safety regulations onto the federal scheme, but, in all likelihood, to encourage even more expansive state efforts in this area. With respect to track roadbed walkways, for example, state imposition and enforcement of regulations going beyond (and interfering with) federal requirements have already resulted in litigation not only in Texas, but in California,[2] Indiana,[3] Michigan,[4] Ohio,[5] and Tennessee.[6] Similar walkways regulations exist in other states.[7] The Texas Railroad Commission has been particularly insistent about extending its regulatory reach, spawning costly, time-consuming litigation. *Missouri Pacific R.R. Co.* v. *Railroad Comm'n of Texas*, 653 F. Supp. 617

[2] *Union Pac. R.R. Co.* v. *Public Utilities Comm'n of California*, No. 82-5952 (9th Cir. June 27, 1983); *Southern Pacific Transportation Co., supra.*

[3] *Black* v. *Seaboard R.R.*, 487 N.E.2d 468 (Ind. App. 1986); *Black* v. *Baltimore & Ohio R.R.*, 398 N.E.2d 1361 (Ind. App. 1980).

[4] *Norfolk & Western Ry. Co.* v. *Burns*, 587 F. Supp. 161 (E.D. Mich. 1984).

[5] *Norfolk & Western Ry. Co.* v. *Public Utilities Comm'n of Ohio*, 926 F.2d 567 (6th Cir. 1991).

[6] *Illinois Central Gulf R.R.* v. *Tennessee Public Service Comm'n*, 736 S.W.2d 112 (Tenn. App. 1987).

[7] *See, e.g.*, Ariz. Corp. Comm'n Admin. Reg. R14-5-405; Mo. Code Regs. tit. 4 § 265-8.110; Nev. Admin. Code ch. 705, § 150 (1987); Or. Rev. Stat. § 761.200, Or. Admin. R. 860-44-210 *et seq.* (1991).

(W.D. Tex.) (granting summary judgment preempting walkway and locomotive equipment rules), *aff'd in part and rev'd in part*, 833 F.2d 570 (5th Cir. 1987) (factual dispute required trial), *on remand*, No. A-86-CA-406 (W.D. Tex. 1990), *aff'd*, 948 F.2d 179 (5th Cir. 1991) (preemption findings after trial upheld), *pet. for cert. pending*, No. 91-1423; *Missouri Pacific R.R. Co.* v. *Railroad Comm'n of Texas*, 850 F.2d 264 (5th Cir. 1988) (caboose rule preempted), *cert. denied*, 488 U.S. 1009 (1989).[8]

There is ample reason to anticipate even more widespread attempts at state regulation in the rail safety area unless this Court's decision makes clear that the FRSA is broadly preemptive. Additional state regulation would undermine and splinter the national uniformity intended by Congress, resulting in the balkanization of rail safety standards. It would also saddle the Nation's railroads with the uncertainty and unproductive costs involved in complying with or challenging a succession of state law requirements in various jurisdictions.

These problems of non-uniformity, uncertainty and unproductive costs would, of course, be exacerbated insofar as the Court's decision left room for state law to operate, with respect to the subject matter of federal regulation,

[8] Other states have attempted to regulate in similar areas. *See, e.g., Burlington Northern R.R.* v. *State of Minnesota*, 882 F.2d 1349 (8th Cir. 1989) (state rule requiring occupied caboose preempted by federal rules concerning power brakes and rear end marking devices); *Burlington Northern R.R.* v. *State of Montana*, 880 F.2d 1104 (9th Cir. 1989) (state caboose regulation preempted).

Municipalities are also active in efforts to regulate in the rail safety area, as demonstrated by the cases cited in the cross-petition and brief in opposition in No. 91-1206. As one recent example, the city council of Gretna, Louisiana, in May 1992 passed Ordinance No. 2065, which purports to regulate, among other things, the maximum length of time a train may block a grade crossing and the number of cars permitted in a train within the city limits. *Compare, e.g., Southern Pacific Co.* v. *Arizona*, 325 U.S. 761 (1945).

by jury verdict or judicial decision. Regulation of railroad safety through common law standards would be particularly destructive of national uniformity because it operates retrospectively and imprecisely. *See Hatfield* v. *Burlington Northern R.R. Co.*, 958 F.2d 320, 324 (10th Cir. 1992) ("hit-or-miss common law method runs counter to . . . statutory scheme"), *pet. for cert. pending*, No. 91-1977; *Rayner* v. *Smirl*, 875 F.2d 60, 66 (4th Cir.), *cert. denied*, 493 U.S. 876 (1989) (subjecting railroad safety laws to "unpredictable medley of jury determinations" would be contrary to congressional quest for national uniformity). This form of regulation makes it difficult and costly for railroads to know precisely what are their legitimate state law obligations, how they mesh with federal law requirements, and how they may best be implemented. If railroads are subject to standards based on what a judge or jury might decide in one place or another, the country would surely end up with a "patchwork and jigsaw puzzle[]"[9] of divergent standards, rather than the nationally uniform railroad safety standards intended by Congress.

As explained below, the congressional mandate of national uniformity reflected two important policy decisions concerning all rail safety matters not "essentially local": (1) There should be one set of rules, not 50. (2) The balancing of competing considerations required in any regulatory process should be done at the national level, by the Secretary. By locating rulemaking responsibility at the national level Congress minimized the possibility that railroads would be subjected to varying, uncoordinated rules reflecting parochial interests in the weighing of costs and benefits.[10] This approach avoids, for example,

[9] 116 Cong. Rec. 27613 (1970) (remarks of Rep. Pickle).

[10] As indicated in the record in No. 91-1423, the railroads showed in a rulemaking proceeding that the Texas roadbed walkway proposal would entail installation and roadbed modification costs of some $49 million and additional maintenance costs of over $1,000,000 annually (Pl. Ex. 16, at 49-72). These state-imposed costs would not only be disproportionate to potential benefits (the cost of injuries from walkways was estimated to be less than $100,000 annually (Pl. Exs. 3, 14, 15)), but would burden commerce by rendering some railroad operations uneconomic. At least one railroad indicated that it would have to shut down or curtail some of its yards in Texas rather than rebuild them as needed to meet the state requirements (Pl. Ex. RDB-2). Similarly, at one yard alone the California walkway rule required one railroad to spend $4 million in reconstruction costs, and led to a shutdown of 13 tracks, resulting in continuing delays of as much as a day for traffic that had gone through the yard. *Southern Pacific Transportation Co.* v. *Public Utilities Comm'n of California*, 647 F. Supp. 1220, 1222 (N.D. Cal. 1986), *aff'd*, 820 F.2d 1111 (9th Cir. 1987) (per curiam).

the likelihood that individual states would weigh costs and benefits differently than the Secretary and adopt requirements imposing costs and burdens that federal standards would not impose.[11]

In deciding this case, the Court should recognize Congress's strong mandate for national uniformity in the railroad safety field. It should make clear that Section 434 must be applied in a manner that will give full effect to that mandate.

II. CONGRESS HAS PREEMPTED BROADLY IN THE RAILROAD SAFETY FIELD

In any preemption analysis, "'"[t]he purpose of Congress is the ultimate touchstone."'" *Cipollone* v. *Liggett Group, Inc.*, 112 S. Ct. 2608, 2617 (1992) (quoting *Malone* v. *White Motor Corp.*, 435 U.S. 497, 504 (1978), and *Retail Clerks* v. *Schermerhorn*, 375 U.S. 96, 103 (1963)). To determine congressional intent, courts must look to

[11] There is heightened concern about the influence of parochial interests when a state is regulating an industry whose members are not headquartered in that state. According to a recent study of the Texas Railroad Commission by Professor Jacqueline Weaver (focusing on oil and gas regulation), the Commission, an elected body, "has favored Texans over non-Texans" and has favored independent local companies over national companies. Weaver & Rago, *"Politics and Poker:" The Texas Railroad Commission*, 17 ABA Admin. L. News 7, 8 (Summer 1992).

"the provisions of the whole law, and its object and policy." *Pilot Life Insurance Co.* v. *Dedeaux*, 481 U.S. 41, 51 (1987). Here, examination of the relevant statute and its "object and policy" reveals that, since 1970, Congress has intended broad preemption of state and local laws and standards in the area of railroad safety.

A. The Statutory Language Broadly Mandates National Uniformity in the Field of Railroad Safety

Congress has explicitly sought national uniformity in the field of railroad safety. In 1970 Congress passed the Federal Railroad Safety Act. That statute conferred broad authority on the Secretary of Transportation to prescribe rules and standards "for all areas of railroad safety." 45 U.S.C. § 431(a). Congress also granted the Secretary a wide range of investigative and enforcement powers designed to help him carry out his responsibilities under the FRSA. 45 U.S.C. §§ 432, 435-39. Congress expressly preempted state and local law. In the opening sentence of the preemption provision of the FRSA, 45 U.S.C. § 434, Congress articulated in expansive terms the goal of national uniformity in the field of railroad safety: "The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable."

It is difficult to imagine a more explicit and comprehensive statement of intent to preempt. Uniformity is to exist not only with respect to laws, rules, and regulations, but also with respect to "orders" and "standards." This terminology is broad enough to encompass common law standards, as well as positive enactments of legislatures and agencies. *Compare Cipollone*, 112 S. Ct. at 2620-21 (plurality opinion) (noting that "requirements" and "prohibitions" are broad terms that encompass common law rules); *id.* at 2634, 2635 (Scalia, J., concurring and dissenting); *Norfolk & Western Ry. Co.* v. *American Train Dispatchers Ass'n*, 111 S. Ct. 1156, 1163 (1991).

Under Section 434, any law, rule, regulation, order, or standard is preempted so long as it "relat[es] to railroad safety." Again the term "relating to" is expansive, signifying any standard that has a connection with rail safety, even if the effect on rail safety is only indirect. *See Morales* v. *Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2038 (1992); *see also id.* at 2037 ("relating to" expresses "a broad preemptive purpose").[12] Finally, the words "*shall* be nationally uniform *to the extent practicable*" mean that preemption is mandatory and is to occur whenever possible. Preemption is not conditioned on a conflict between state and federal standards or on a finding that the state regulation imposes a burden on commerce, although either would of course be sufficient to result in preemption. In short, the first sentence of Section 434 leaves little room for any deviation from a national standard.

The remaining two sentences of Section 434 provide for the only two limited exceptions to preemption: (1) state regulation where the Secretary of Transportation had not yet adopted a rule or standard "covering the subject matter" of the state requirement; and (2) additional or more stringent state regulation that is necessary to address a particular "essentially local" hazard. Each of these exceptions is narrowly drawn so as not to interfere with Congress's ultimate goal of national uniformity.

By its terms the "covering the subject matter" exception is a temporary measure. It allowed state regulation to survive during the period when the Secretary was conducting studies and formulating comprehensive uniform national regulations. *See Missouri Pacific*, 850 F.2d at 268 n.3 (reading the exception as "indicative of congressional intent that states play an important stopgap

---

[12] *Compare Pilot Life* v. *Dedeaux*, 481 U.S. at 47-48 (certain common law causes of action constitute "State laws" that "relate to" an employee benefit plan and therefore meet criteria for preemption under ERISA § 514(a)).

role in the safe transition from state to federal regulation of railroads").

The "local hazard" exception for additional or more stringent state regulation is strictly limited in several ways. In order to fit within the exception, a state regulation must be "necessary" to eliminate or reduce a hazard, and that hazard must be "essentially local." Therefore, the hazard in question must be in some way unique, not simply a condition common to many locations. Consistent with Congress's goal of national uniformity, even state regulation of an "essentially local" hazard cannot survive if it either is "incompatible" with any federal regulation or creates an "undue burden" on interstate commerce.[13]

The mandate for national uniformity in Section 434 is part of a remedial scheme and should therefore be liberally construed. *See, e.g., Pinter* v. *Dahl*, 486 U.S. 622, 653 (1988); *Tcherepnin* v. *Knight*, 389 U.S. 332, 336 (1967). Like most exceptions to broad general statements of policy in remedial legislation, the two exceptions in Section 434 should be read narrowly. *Compare, e.g., Commissioner* v. *Clark*, 489 U.S. 726, 739 (1989); *A. H. Phillips, Inc.* v. *Walling*, 324 U.S. 490, 493 (1945); *Spokane & Inland Empire R.R. Co.* v. *United States*, 241 U.S. 344, 350 (1916) (exceptions contained in rail safety statute strictly construed).[14] Indeed, a narrow construction of the exceptions is virtually compelled in view of Congress's mandate that rail safety standards be nationally uniform "to the extent practicable."

---

[13] These limitations in the "essentially local" hazard exception make clear that in the preceding portions of Section 434 Congress also intended preemption of *any* state law or regulation that is incompatible with federal law or regulations.

[14] One court of appeals has characterized the exceptions in Section 434 as authorizing only "a narrow spectrum of deviation from national uniformity . . . ." *Donelon* v. *New Orleans Terminal Co.*, 474 F.2d 1108, 1112 (5th Cir.), *cert. denied*, 414 U.S. 855 (1973).

B. The History of the FRSA Confirms That Congress Wanted National Uniformity in Railroad Safety Standards

The history of the FRSA confirms the breadth of Congress's mandate for national uniformity. Congress was plainly dissatisfied with the patchwork approach to rail safety that had prevailed before enactment of the FRSA. Following the introduction of proposals for broad federal rail safety legislation, the Secretary of Transportation in 1969 appointed a task force on railroad safety, including representatives of federal and state agencies, the railroads, and labor. The task force found that existing federal statutes and regulations did not reach many aspects of railroad operations and that there was no uniform pattern of state involvement in rail safety matters. As a result, federal and state regulations covered only limited aspects of rail safety. H.R. Rep. No. 91-1194, 91st Cong., 2d Sess. 73 (1970) (Appendix F). The task force concluded that rail safety "requires a more comprehensive national approach." *Id.*

Congress echoed the task force's expression of concern at the lack of uniformity and ineffectiveness of existing regulation. The Senate Committee observed: "Some 95 percent of the causes of accidents on railroads are in no way covered by Federal statutes or by State law." S. Rep. No. 91-619, 91st Cong., 1st Sess. 4 (1969). Congress recognized that, while railroad operations are interstate in nature, there had been no coordinated national effort to remedy the serious rail safety problems that faced the nation. *See* 116 Cong. Rec. 27611 (1970) (remarks of Rep. Staggers) ("There are no uniform State safety regulations. We have nationwide rail transportation, but we do not have a nationwide rail safety program."); *id.*, at 27615-16 (remarks of Rep. Reed). Congress therefore initiated a comprehensive scheme of federal regulation, including imposition of mandatory standards by

the Secretary of Transportation "at the earliest practicable date." S. Rep. No. 91-619, at 5.

Congress emphasized that the national nature of the railroad industry required both uniform regulation and uniform enforcement:

> With the exception of industrial or plant railroads, the railroad industry has very few local characteristics. Rather, in terms of its operations, it has a truly interstate character calling for a uniform body of regulation and enforcement. It is a national system. . . . The integral operating parts of these companies cross many State lines. In addition to the obvious areas of rolling stock and employees, such elements as operating rules, signal systems, power supply systems, and communication systems of a single company normally cross numerous State lines. To subject a carrier to enforcement before a number of different State administrative and judicial systems in several areas of operation could well result in an undue burden on interstate commerce.

H.R. Rep. No. 91-1194, at 13. *See also id.* at 11 ("The committee does not believe that safety in the Nation's railroads would be advanced sufficiently by subjecting the national rail system to a variety of enforcement in 50 different judicial and administrative systems.").

Congress provided specifically for a coordinated effort by the Secretary to solve the grade crossing problem. 45 U.S.C. § 433. It also had in mind many other subjects, including derailments caused by inadequate track and roadbed maintenance, inadequate standards for rail car manufacture and railroad employee safety. *See, e.g.*, S. Rep. No. 91-619, at 3, 30; H.R. Rep. No. 91-1194, at 10. Ultimately, Congress made clear that it was rejecting a piecemeal approach in favor of a comprehensive national effort extending to all aspects of rail safety. *See* S. Rep. No. 91-619, at 5 ("The Secretary of Transportation should have general authority over all areas of rail-

road safety . . . ."); 116 Cong. Rec. 27613 (1970) (remarks of Rep. Pickle) (the FRSA "precludes the possibility of 50 different sets of safety regulations from 50 different States . . . [and] take[s] away the potential for patchwork and jig-saw puzzles in the area of railroad safety").

The history of the FRSA makes it clear that the two exceptions to national uniformity stated in Section 434 were to have a narrow application. The second sentence of Section 434, providing that a state may adopt or continue in force a regulation or standard, but only until the Secretary has adopted a regulation or standard "covering the subject matter of such State requirement," was an interim or short-term measure. The House Committee recognized that there were many gaps in the federal regulatory scheme and that the Secretary could not act immediately on all fronts. H.R. Rep. No. 91-1194, at 18.[15] Secretary Volpe explained that "during the period that we are developing national standards present State regulations would remain in effect." *Railroad Safety and Hazardous Materials Control: Hearings on H.R. 7068, H.R. 14417, H.R. 14478, and S. 1933 Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 2d Sess. 43 (1970) ("*1970 House Hearings*"). The Secretary added that the "covering the subject matter" exception would serve "[t]o avoid a lapse in regulation . . . from the mere enactment of a broad authorizing Federal statute . . . ." *Id.* at 51.

Eventually, however, it was expected that the Secretary would address all areas relating to rail safety, and a comprehensive federal regulatory scheme would govern.

---

[15] Section 202(e) of the FRSA required the Secretary to issue initial rail safety regulations, based on existing safety data and standards, within one year from enactment of the FRSA, and thereafter to revise such regulations as necessary. 45 U.S.C. § 431(e).

See 116 Cong. Rec. 27612 (1970) (remarks of Rep. Springer) ("The main idea is to obtain full coverage of all safety programs whether formerly under Federal jurisdiction or otherwise. . . . Uniform regulations must be forthcoming and must be rigidly enforced. In this regard the bill provides that Federal regulations will override all others.") At that point, the states would be confined to regulating "essentially local" hazards, under the conditions stated in the third sentence of Section 434. *See 1970 House Hearings*, at 43 (testimony of Secretary Volpe) ("States would remain free to regulate in a given localized area. . . . But other than that, we would preempt the State statutes by the issuance of these national standards."); 116 Cong. Rec. 27612 (1970) (remarks of Rep. Staggers) ("The States may regulate in any area of railroad safety until the Secretary acts. After the Secretary has acted, the States may still regulate with respect to essentially local hazards.").

The "local hazard" exception was to be construed narrowly. It was not to cover statewide conditions, but only "local situations not capable of being adequately encompassed within uniform national standards." H.R. Rep. No. 91-1194, at 19. *See also id.* (under the local hazard exception, "there is no intent to permit a State to establish Statewide standards superimposed on national standards covering the same subject matter").[16]

Congress considered, but ultimately rejected, a proposed preemption provision that would have allowed states

[16] The House Committee added the term "essentially" as a modifier to "local hazard" in response to a suggestion by the Association of American Railroads, in order to make clear that the exception referred only to local situations, not to statewide conditions. *See 1970 House Hearings*, at 114 (testimony of William M. Moloney); H. R. Rep. No. 91-1194, at 2.

to supplement federal regulation in all areas of rail safety. An early version of proposed rail safety legislation, S.1933, provided that state standards would be preempted only if the federal standard was "equal to or higher than" the state standard. *Federal Railroad Safety Act of 1969: Hearings on S.1933, S.2915, and S.3061 Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce*, 91st Cong., 1st Sess. 1 (1969). The Secretary of Transportation and the Federal Railroad Administrator testified that such a provision would be inadvisable, because it would be inconsistent with national uniformity and because it would result in "lengthy litigation to determine the exact effect of the Federal Government's standard in relationship to the existing similar State or local regulation." *Id.* at 340, 343. The Senate Committee subsequently eliminated the "equal to or higher than" standard. Instead, it permitted states to adopt additional or more stringent standards than the federal standards only under the conditions defined by the "essentially local hazard" exception. *See* S. Rep. No. 91-619, at 8-9.[17]

III. TO MEET CONGRESS'S MANDATE FOR NATIONAL UNIFORMITY, THE TRANSITIONAL "COVERING THE SUBJECT MATTER" EXCEPTION MUST BE CONSTRUED NARROWLY

One continuing problem impeding achievement of Congress's goal of nationally uniform regulation of rail safety has been persistent efforts by states and by plaintiffs' attorneys to invoke an expansive reading of the "covering the subject matter" exception. These efforts have resulted in uncertainty and costly litigation, in which some courts

[17] The House Committee likewise considered and rejected the "equal to or higher than" language. *Compare 1970 House Hearings*, at 2, *with* H.R. Rep. No. 91-1194, at 2.

have thought it necessary or appropriate to engage in a detailed comparison of the terms of the federal and state regulations, in order to determine whether they are similar in purpose, match precisely in their content and approach, or involve functional conflicts. *See, e.g., Missouri Pacific*, 948 F.2d at 183-84 (analyzing functional relationship of regulations); *Southern Pacific*, 647 F. Supp. at 1224-25 (analyzing content and comparing regulatory objectives). While state regulations that have the same purpose, match in content, or conflict with federal rail safety regulations would certainly be preempted at a minimum, the purposes of Section 434 require preemption even without such a showing.

A. The "Covering the Subject Matter" Exception Is a Transitional Measure that Lacks Continuing Force

As explained in Part II, the "covering the subject matter" exception is a stopgap measure, designed to avoid a regulatory vacuum during the transitional period immediately following passage of the FRSA when the Secretary was conducting studies and drafting regulations. This interpretation is consistent with the structure and language of the statute, as well as the overriding legislative purpose. Once a comprehensive federal regulatory scheme was in place, state regulation should be largely or entirely confined to "essentially local" hazards, since a multiplicity of state standards would defeat Congress's overall goal of national uniformity.

Within the year following enactment of FRSA, and thereafter, the Secretary adopted hundreds of federal rail safety regulations and standards covering in detail virtually all aspects of rail operations, including traffic control devices at grade crossings and train speed. *See* 49 C.F.R. Ch. II; 23 C.F.R. Chs. I, II.[18] By now, more than

[18] Other subjects covered by the Secretary's regulations include rail safety enforcement procedures, track safety standards, freight car standards, operating rules and practices, alcohol and drug use,

20 years after enactment of the FRSA, the Secretary has "cover[ed]" virtually every "subject matter" within the meaning of Section 434. At this point, the field of rail safety should be governed essentially by federal rail safety standards, thereby fulfilling the mandate for national uniformity stated in the first sentence of Section 434. One federal court of appeals has explicitly recognized that there should now be little, if any, scope for the application of the "covering the subject matter" exception. In finding preemption of a state requirement of cabooses not required by federal regulations the Fifth Circuit noted:

> The FRSA has been in effect eighteen years. If there remain non-local matters of railroad safety open for state regulation, they do not include areas in which the FRA has chosen not to act.

Missouri Pacific, 850 F.2d at 268 n.3.[19]

B. Assuming the "Covering the Subject Matter" Exception Continues to Have Some Force, It Should Be Interpreted to Preserve Broad Preemption

1. *Reading the Exception to Preserve Broad Preemption Best Serves the Purpose and Language of the Statute*

Assuming *arguendo*, however, that the second sentence of Section 434 has some continuing vitality even when a comprehensive federal regulatory scheme is in place, the phrase "covering the subject matter" should be interpreted and applied to meet Congress's overall mandate

radio procedures, rear end marking devices, safety glazing standards, accident reporting, signal systems reporting, signal and train control systems, and locomotive engineer qualifications. 49 C.F.R. Pts. 209, 213, 215, 217-21, 223, 225, 233, 236, 240.

[19] Other courts that have ruled on rail safety preemption issues have applied Section 434 without considering whether the "covering the subject matter" exception should be viewed as lacking continuing force. Most courts appear to have merely assumed that the exception continues to apply.

for national uniformity "to the extent practicable." In construing this remedial legislation, courts should take a liberal approach to determining when the Secretary has "cover[ed]" the subject of a state regulation. The alternative approach—a niggling construction that would require courts to engage in a painstaking search for gaps in the federal scheme and that would permit state regulation in these interstices—would produce the very patchwork that Congress sought to avoid in passing the FRSA.

The statute itself does not provide any basis for taking a restrictive view of the circumstances in which the Secretary has "cover[ed] the subject matter" of a state requirement. These words are not technical in nature. They do not suggest that the Secretary must regulate in a particular manner in order to trigger preemption.[20] Nor does the term "subject matter" denote a specific classification of subjects against which the regulations in question must be matched. The words do not dictate the use of narrow, artificial distinctions among related aspects of rail operations.

2. *The Existence of Different Regulatory Objectives Should Not Bar a Finding of Preemption*

The fact that the Secretary and a state may have had different regulatory objectives certainly should not bar a finding that the Secretary has "cover[ed] the subject matter" of a state regulation. In this case Easterwood argued that the Secretary's regulations concerning train speed did not cover the same subject matter as a state law negligence claim because, she asserted, the federal regulations had a different purpose (avoiding derailment) than the common law of negligence (avoiding a collision).

[20] Indeed, Congress indicated that to "cover" a subject matter a regulation need do no more than to "concern" it. S. Rep. No. 91-619, at 9 (under § 434 state requirements are "preempted by Federal action concerning the same subject matter").

See Cross-Petition, No. 91-790, at 5.[21] The court of appeals rejected that argument as being at odds with this Court's decisions and also noted the difficulty in establishing the purpose of regulations. Pet. App. 8a. In litigation concerning roadbed walkways, however, the Fifth and Ninth Circuits have divided on this issue. *Compare Missouri Pacific*, 833 F.2d at 574 (same purpose not required), *with Southern Pacific*, 647 F. Supp. at 1225 (same purpose required). The positions taken by the courts of appeals in this case and in *Missouri Pacific* are correct.

This Court has long held that the underlying purpose of a state regulation is not controlling in the determination whether the regulation is preempted:

> The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced *without impairing the federal superintendence of the field*, not whether they are aimed at similar or different objectives.

Florida Lime & Avocado Growers, Inc. v. *Paul*, 373 U.S. 132, 142 (1963) (emphasis added). *See also Gade* v. *National Solid Wastes Management Ass'n*, 112 S.Ct. 2374, 2387 (1992); *Perez* v. *Campbell*, 402 U.S. 637, 651-52 (1971); *Napier* v. *Atlantic Coast Line R.R. Co.*, 272 U.S. 605, 612-13 (1926). Congress can be presumed to have been aware of this principle when it enacted the FRSA. *See, e.g., Wisconsin Dep't of Revenue* v. *William Wrigley, Jr., Co.*, 112 S.Ct. 2447, 2457-58 (1992); *United States Dep't of Energy* v. *Ohio*, 112 S.Ct. 1627, 1633 (1992); *McNary* v. *Haitian Refugee Center, Inc.*, 111 S.Ct. 888, 898 (1991). Congress similarly knew that courts are reluctant to delve into the objectives of regu-

[21] Similarly, Easterwood attempted to characterize federal regulations concerning grade crossing as having purposes relating only to funding. *See* Brief in Opposition, No. 91-790, at 5-8.

lators, given the difficulty of making such determinations. *See, e.g., Palmer* v. *Thompson*, 403 U.S. 217, 224-25 (1971); *United States* v. *O'Brien*, 391 U.S. 367, 383-84 (1968); Pet. App. 8a (court of appeals notes that "guess-[ing] at the motives behind [regulation] . . . is inherently suspect").

Had it intended courts to find identical regulatory objectives in order for there to be preemption under Section 434, Congress surely would have made this explicit. However, nothing in that provision suggests that regulatory objectives should govern the outcome of the preemption analysis.[22] The phrase "covering the subject matter" on its face does not express any need for a common regulatory objective. It indicates merely that there must be an overlap or relationship between the subject matter of the federal regulation and the subject matter of the state requirement in order for preemption to occur.

Moreover, if state regulations could stand whenever the state could demonstrate a regulatory objective different from that of the Secretary, they could apply even though they conflict or are otherwise incompatible with federal regulations.[23] There would be nothing left of national uniformity. States (or localities or juries) would ordinarily have some objectives that are different from those of the Secretary, since each would be likely to be responding to a separate set of interests. A state that wished to circumvent Congress's intent to preempt could merely

[22] Of course, a similarity of objectives would tend to confirm the conclusion that federal and state regulations "cover[]" the same "subject matter." *See, e.g., Burlington Northern*, 880 F.2d at 1106-08.

[23] As the courts found in the Texas walkways case, even if it had different objectives the state regulation was incompatible with the federal roadbed requirements because, in operation, walkways are an integral part of track support structures, and the state requirements in fact added to and even impaired the federal requirements. *See Missouri Pacific*, 948 F.2d at 183-85.

articulate a different objective from the one that appears to underlie the federal regulation. *See, e.g., Perez* v. *Campbell*, 402 U.S. at 652; *Missouri Pacific*, 833 F.2d at 574. Federal superintendence of the railroad safety field would be thwarted by such an interpretation.

3. *Regulation in the Same Manner or to the Same Extent Should Not Be Required for a Finding of Preemption*

It also should not be necessary for a state and the Secretary to have regulated an area in precisely the same manner or to the same extent in order for the Secretary to have "cover[ed] the subject matter" of the state regulation. The statutory language does not on its face require precise congruence. That construction would mean that the Secretary could not achieve the mandated goal of national uniformity unless federal regulations incorporated virtually all aspects of existing or potential regulations of all the states. That is the antithesis of what Congress had in mind. Indeed, it would be equivalent to the "equal to or higher than" approach that Congress rejected. *See* page 17, *supra*.

Moreover, Congress did not require that the Secretary regulate in the very same manner in order to trigger preemption. The reason for this is obvious: in most cases the Secretary and a state agency (or a local agency, court, or jury) would not be likely to take the same approach to a subject. A state or local body can be expected to take a more parochial view than the Secretary, who ordinarily must balance a broader group of concerns. In addition, the regulatory scheme that is likely to be most appropriate on a national scale may be inadvisable or even infeasible on the state or local level, and vice versa.

The matters at issue in this case present prime examples of how the Secretary has taken a very different regulatory approach than could be expected from states

and localities (including courts and juries). In response to the provisions of the FRSA and other congressional directives, the Secretary administers a comprehensive federal scheme under which state agencies, acting pursuant to delegated authority, are responsible for determining the need for traffic control devices following a survey of grade crossings within the state. The state agencies develop criteria for evaluating what type of equipment is appropriate for each grade crossing and the order in which improvements should be made, taking into account the conditions at all grade crossings within the state. The factors considered by a state agency can include number of tracks, sight distance, the volume of traffic at a crossing, the speed of trains passing through a crossing, and much more. *See* 23 C.F.R. Pts. 646, 655, 924, 1204.[24]

The jury in a tort case takes a much different approach. It applies a common law standard of care, with a focus on the consequences of a single accident at a particular grade crossing. The jury operates with the benefit of hindsight, and, because such cases often involve local residents who experience tragic injuries, they are ordinarily fraught with emotion. A jury is unlikely to consider matters such as the effect of requiring slower train speeds on interstate commerce (and the likelihood that slower speeds would actually lead to more grade crossing accidents) and the need for finite resources to be allocated to other higher-priority grade crossings within the state.

The approaches taken by the Secretary and a local jury are very different. Nevertheless, it should be clear that the Secretary has "cover[ed] the subject matter" of train speed and the need for traffic control devices at grade

[24] The briefs submitted by CSXT and the Association of American Railroads describe in detail the work of the state agencies in the federal grade crossing safety program.

crossings. That is enough to preempt state common law standards on this subject.[25]

4. *Determining That the Secretary Has "Covered" a "Subject Matter" Should Not Require a Complicated Showing*

Determining whether the Secretary has "cover[ed] the subject matter" of a state regulation should be a straightforward exercise. Yet in the Texas walkways case the railroads were required to engage in extensive litigation in persuading the courts that state specifications for roadbed walkways were preempted. A walkway is an area on the side of a railroad track, structurally incorporated into the roadbed that supports the track structure. The Secretary's rail safety regulations include a section entitled "Track Safety Standards," 49 C.F.R. Pt. 213. Subpart B, entitled "Roadbed," "prescribes minimum requirements for roadbed and areas immediately adjacent to roadbed." 49 C.F.R. § 213.31. Subpart D is entitled "Track Structure." The Secretary's regulations do not use the word "walkways" and do not impose the sorts of specifications that are contained in the state regulations.

A dozen witnesses testified at the trial in the Texas walkways case. Extensive expert testimony showed that the roadbed would have to be enlarged and strengthened in order to support the walkway, that the material used to support the walkways would be integrated with the roadbed and would in essence constitute an extension of it, and that the addition of walkways would impair drainage and weaken the track support structures. *See Mis-*

[25] The court of appeals in this case did not provide a full analysis of the "covering the subject matter" issue, apparently because it believed that the Secretary's grade crossing regulations were not promulgated under his authority to regulate rail safety and that the exception therefore did not apply. We believe the court's conclusions on these points were in error, as discussed in the submissions of CSXT and AAR.

souri Pacific, 948 F.2d at 183-84. That evidence was certainly sufficient to support the conclusion that the Texas regulation was preempted. Where a state regulation conflicts with, adds to, or is otherwise incompatible with a federal regulation, the regulations surely must be deemed to "cover[]" the same "subject matter" for purposes of Section 434.

However, courts should not have to engage in such a complicated factual analysis. Congress expected that national uniformity would prevail in the rail safety area and that "lengthy litigation" would not be needed to determine the scope of federal preemption. Rather than identifying fine distinctions based on narrow (and often artificial) categories of rail operations (*e.g.*, roadbeds v. walkways) and then analyzing the interrelationships between the categories and evaluating the effect of the state regulation in question, it should be enough for a court to examine the Secretary's regulations and conclude that in a general sense they address the relevant area of rail operations. For example, in the case of state walkways regulation, a court should be able to conclude that the Secretary has "cover[ed] the subject matter" by regulating the broad area of "track safety standards" (including roadbed and track structure standards). *See Black* v. *Seaboard System R.R.*, 487 N.E.2d at 469; *Black* v. *Baltimore & Ohio R.R.*, 398 N.E.2d at 1363. *See also Norfolk & Western*, 926 F.2d at 570-71.

If the Court concludes that the "covering the subject matter" exception has any continuing vitality, it should adopt a broad approach to determining when the Secretary has "cover[ed]" a particular "subject matter." Only that approach will serve Congress's goal of avoiding lengthy litigation concerning the scope of preemption. Moreover, the broad approach is essential in order to avoid the "patchwork" that Congress rejected in passing the FRSA and to serve Congress's goal of achieving national uniformity "to the extent practicable."

CONCLUSION

The Court should reverse in No. 91-790 and affirm in No. 91-1206.

Respectfully submitted,

CAROLYN F. CORWIN
CECILY E. McCOWEN
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

PAUL A. CUNNINGHAM
GERALD P. NORTON *
PEPPER, HAMILTON & SCHEETZ
1300 - 19th Street, N.W.
7th Floor
Washington, D.C. 20036
(202) 828-1200

ROBERT BRIAN BURNS, JR.
WILSON, GROSENHEIDER & BURNS
P.O. Box 1584
Austin, Texas 78767
(512) 478-1657

Counsel for Amici Curiae
Texas Class I Railroads

August 27, 1992

* Counsel of Record